

1 Brian Johnson, State Bar No. 235965  
 2 Josh Voorhees, State Bar No. 241436  
 3 THE CHANLER GROUP  
 4 2560 Ninth Street  
 5 Parker Plaza, Suite 214  
 6 Berkeley, CA 94710-2565  
 7 Telephone: (510) 848-8880  
 8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff  
 10 RUSSELL BRIMER

(ENDORSED)  
**FILED**  
 NOV 15 2012

DAVID H. YAMAGAKI  
 Chief Executive Officer/Deputy  
 Superior Court of CA County of Santa Clara  
 BY \_\_\_\_\_ DEPUTY

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 12 COUNTY OF SANTA CLARA  
 13 UNLIMITED CIVIL JURISDICTION

14 RUSSELL BRIMER,  
 15 Plaintiff,  
 16 v.  
 17 CAPITOL RECORDS, LLC; and DOES 1-150,  
 18 inclusive,  
 19 Defendants.

Case No. 112CV216180

**[PROPOSED] JUDGMENT PURSUANT TO  
 TERMS OF PROPOSITION 65  
 SETTLEMENT AND CONSENT  
 JUDGMENT**

Date: November 15, 2012  
 Time: 9:00 a.m.  
 Dept. 9  
 Judge: Hon. Mark Pierce

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Plaintiff, Russell Brimer, and defendant, Capitol Records, LLC, having agreed through their respective counsel that Judgment be entered pursuant to the terms of their settlement agreement in the form of a Consent Judgment, and following this Court's issuance of an Order approving this Proposition 65 settlement and Consent Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health & Safety Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered in accordance with the terms of the Consent Judgment attached hereto as Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.

**IT IS SO ORDERED.**

Dated: NOV 15 2012

**Hon. Mark H. Pierce**

JUDGE OF THE SUPERIOR COURT

# Exhibit 1

1 Clifford A. Chanler, State Bar No. 135534  
Brian C. Johnson, State Bar No. 235965  
2 THE CHANLER GROUP  
2560 Ninth Street  
3 Parker Plaza, Suite 214  
Berkeley, CA 94710-2565  
4 Telephone: (510) 848-8880  
Facsimile: (510) 848-8118  
5 Attorneys for Plaintiff  
6 RUSSELL BRIMER

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF SANTA CLARA  
11 UNLIMITED CIVIL JURISDICTION  
12

13 RUSSELL BRIMER

14 Plaintiff,

15 v.

16 CAPITOL RECORDS, LLC; and DOES 1-150,  
inclusive,

17 Defendants.  
18  
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Case No. 112CV216180

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Russell Brimer (“Brimer”  
4 or “Plaintiff”), and defendant, Capitol Records, LLC (“Capitol” or “Defendant”), with Brimer and  
5 Capitol individually referred to as a “Party” and collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

7 Brimer is an individual residing in California who seeks to promote awareness of  
8 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous  
9 substances contained in consumer products.

10 **1.3 Defendant**

11 Capitol employs ten or more persons and is a person in the course of doing business for  
12 purposes of The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &  
13 Safety Code § 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 Brimer alleges that Capitol sold mugs with exterior colored artwork or designs containing  
16 lead without first providing the clear and reasonable warning required by Proposition 65. Lead is  
17 listed pursuant to Proposition 65 as a chemical known to the state of California to cause birth  
18 defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment, and to which this Consent Judgment is  
21 specifically limited, are ceramic mugs with colored artwork or designs on the exterior of the  
22 vessel (“Exterior Decorations”). All such items are referred to collectively hereafter as “Covered  
23 Products.”

24 **1.6 Notice of Violation**

25 On or about September 19, 2011, Brimer served Capitol and various public enforcement  
26 agencies with a “60-Day Notice of Violation” (“Notice”), a document that informed Capitol and  
27 the public enforcers of Brimer’s allegation that Capitol was in violation of Proposition 65 for  
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1 failing to warn its customers and consumers in California that the Covered Products expose users  
2 to lead.

3 **1.7 Capitol's Proposition 65 Compliance Efforts and Response to the Notice**

4 Capitol represents that, before receiving the Notice, it was unaware of any claimed non-  
5 compliance of Covered Products with the standards in the Consent Judgment in *Russell Brimer v.*  
6 *The Boelter Companies, et al.*, San Francisco Superior Court No. CGC-05-440811. Following  
7 receipt of the Notice, Capitol began an investigation into all mugs that it shipped to customers for  
8 sale in California and ceased shipping mugs for sale in California pending the outcome of this  
9 investigation. In November 2011, in response to the Notice, Capitol provided Proposition 65  
10 warning stickers to certain customers it knew were offering the mugs for sale in California. By  
11 February 2012, Capitol resumed shipping mugs for sale in California with a warning that stated  
12 "WARNING: This product contains chemicals known to the State of California to cause birth  
13 defects or other reproductive harm."

14 **1.8 Complaint**

15 On January 5, 2012, Brimer filed the instant action against Capitol ("Complaint") for the  
16 violations of Health & Safety Code § 25249.6 alleged in the Notice.

17 **1.9 No Admission**

18 Capitol denies the material, factual, and legal allegations contained in the Notice and  
19 Complaint, and maintains that all of the products that it has sold in California, including the  
20 Covered Products, have been, and are, in compliance with all laws. Nothing in this Consent  
21 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law,  
22 or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as  
23 an admission of any fact, finding, conclusion of law, issue of law, or violation of law, the same  
24 being specifically denied by Capitol. This Section shall not, however, diminish or otherwise  
25 affect Capitol's obligations, responsibilities, and duties under this Consent Judgment.

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1           **1.10 Consent to Jurisdiction**

2           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
3 jurisdiction over Capitol as to the allegations in the Complaint, that venue is proper in the Santa  
4 Clara County, and that this Court has jurisdiction to enter and enforce the provisions of this  
5 Consent Judgment.

6           **1.11 Effective Date**

7           For purposes of this Consent Judgment, the term “Effective Date” shall mean the date this  
8 Consent Judgment is approved by this Court.

9           **2. INJUNCTIVE RELIEF: REFORMULATION**

10          **2.1 Reformulated Products**

11          Commencing on August 31, 2012, and continuing thereafter, Capitol shall not  
12 manufacture nor cause to be manufactured for sale in California Covered Products that are not  
13 Reformulated Products, unless such Covered Products are sold with clear and reasonable  
14 warnings pursuant to Section 2.3. For purposes of this Consent Judgment, “Reformulated  
15 Products” are Covered Products that comply with the reformulation standards set forth in Section  
16 2.2 (“Reformulation Standards”).

17          **2.2 Reformulation Standards**

18          Reformulated Products shall meet the standards outlined in either Section 2.2.1, 2.2.2 or  
19 2.2.3, subject to the following qualifications:

20                 If the Covered Product contains Exterior Decorations in the Lip and Rim Area (as used  
21 throughout this Consent Judgment, the Lip and Rim Area shall include the exterior upper 20  
22 millimeters of a Covered Product), it must also satisfy Section 2.2.4 to be considered a  
23 Reformulated Product.

24                 **2.2.1 Wipe Test-Based Standard**

25                 The Covered Product shall yield a maximum result of 1.0 micrograms (“ug”) lead by  
26 weight on the surface of all Exterior Decorations analyzed according to the NIOSH 9100 testing  
27 protocol.

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**2.2.2 Content-Based Standard**

Exterior Decorations shall only utilize materials that contain a maximum of 100 parts per million (“ppm”) (0.01%) lead by weight as measured either before or after the material is fired onto (or otherwise affixed to) the Covered Product using EPA Test Methodologies 3050B and 6010B.<sup>[2]</sup>

**2.2.3 Total Acetic-Acid Immersion Test-Based Standard**

The Covered Product shall achieve a result of 0.99 ppm (.0099%) or less lead after correcting for internal volume when tested pursuant to American Society of Testing and Materials (“ASTM”) Standard Test Method C927-99-80 (2009) modified for total immersion.

**2.2.4 Lip and Rim Area Exterior Decoration**

If a Covered Product contains Exterior Decorations in the Lip and Rim Area:

- (a) any such Exterior Decorations must only utilize decorating materials that yield a result of no detectable lead when analyzed according to any test methodology authorized under Proposition 65; or
- (b) the Covered Product must yield a maximum lead concentration of one-half microgram per milliliter (0.5 µ/ml.) when tested according to ASTM Test Method C927-80 (2009).

**2.3 Clear and Reasonable Warnings**

**2.3.1** For Covered Products that Capitol ships, sells or offers to ship for sale in California that are not Reformulated Products, Capitol shall provide a clear and reasonable warning. Capitol shall provide such warning affixed to the packaging or labeling, or directly to the Covered Product, with one of the following statements:

- (a) **WARNING:** The materials used as colored decorations on the exterior of this product contain chemicals known to the State of California to cause birth defects or other reproductive harm.

<sup>[2]</sup> If the Exterior Decoration is tested by Capitol after it is affixed to a Covered Product, the percentage of lead by weight must relate only to the decorating material and must not include any quantity attributable to non-decorating material (e.g., the ceramicware substrate).



1 (b) **WARNING:** This product contains chemicals  
2 known to the State of California to  
3 cause birth defects or other  
4 reproductive harm.

5 **2.3.2** The warning shall be prominently placed with such conspicuousness as  
6 compared with other words, statements, designs, or devices as to render it likely to be read  
7 and understood by an ordinary individual under customary conditions of purchase or use.

8 **3. MONETARY PAYMENTS**

9 **3.1 Initial Civil Penalty Payment**

10 Pursuant to Health & Safety Code § 25249.7(b), Capitol shall pay an initial civil penalty  
11 in the amount of \$10,000. The initial civil penalty shall be allocated according to Health &  
12 Safety Code § 25249.12 (c)(1) and (d), with seventy-five percent of the penalty payment  
13 earmarked for the California Office of Environmental Health Hazard Assessment (“OEHHA”),  
14 and the remaining twenty-five of the penalty payment earmarked for Brimer.

15 **3.2 Final Civil Penalty Payment; Waiver Upon Certification**

16 Pursuant to Health & Safety Code § 25249.7(b), on June 15, 2013, Capitol shall pay a  
17 final civil penalty in the amount of \$30,000. The final civil penalty shall be waived in its entirety,  
18 if, between May 1, and June 1, 2013, an officer of Capitol certifies to Brimer’s counsel in writing  
19 that 100% of Capitol’s Covered Products that Capitol received after March 31, 2012 and that  
20 were shipped, sold, or distributed for sale in California after September 15, 2012 are  
21 Reformulated Products, and that Capitol will continue to do so after the date of certification.

22 Unless waived, the final civil penalty shall be allocated according to Health & Safety  
23 Code § 25249.12 (c)(1) and (d), with seventy-five percent of the penalty payment earmarked for  
24 OEHHA, and the remaining twenty-five of the penalty payment earmarked for Brimer.

25 **3.3 Reimbursement of Plaintiff’s Fees and Costs**

26 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute  
27 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving  
28 the issue to be resolved after the material terms of the agreement had been settled. Shortly after  
all other settlement terms had been finalized, Capitol expressed a desire to resolve the issue. The

1 Parties then attempted to (and did) reach an accord on the compensation due Brimer and his  
2 counsel under general contract principles and the private attorney general doctrine codified at  
3 California Code of Civil Procedure § 1021.5 for all work performed in this matter exclusive of  
4 fees and costs that may be incurred on appeal, if any. Under these legal principles, Capitol shall  
5 pay \$45,000 for fees and costs incurred investigating, litigating, and enforcing this matter,  
6 including the fees and costs incurred (and to be incurred) negotiating a settlement, drafting the  
7 motion for judicial approval, and moving the Court for, and obtaining its approval of, this  
8 Consent Judgment in the public interest.

9 **3.4 Payment Procedure**

10 **3.4.1 Initial Civil Penalty and Reimbursement of Fees and Costs**

11 All payments made under Sections 3.1 and 3.3 of this Consent Judgment shall be  
12 delivered within five business days of the Effective Date (provided Plaintiff shall have provided  
13 Capitol with completed applicable Forms W-9), and in the form of three checks for the  
14 following amounts, made payable to:

- 15 (a) "The Chanler Group in Trust for OEHHA" in the amount of \$7,500;
- 16 (b) "The Chanler Group in Trust for Russell Brimer" in the amount of \$2,500;
- 17 and
- 18 (c) "The Chanler Group" in the amount of \$45,000.

19 **3.4.2 Final Civil Penalty Payment**

20 Unless waived, the final civil penalty payment shall be allocated according to  
21 Health & Safety Code § 25249.12(c)(1) and (d), with seventy-five percent of the penalty amount  
22 earmarked for OEHHA, and the remaining twenty-five percent retained by Brimer. On June 15,  
23 2013, Capitol shall deliver two checks for the following amounts, made payable to:

- 24 (a) "The Chanler Group in Trust for OEHHA" in the amount of \$22,500; and
- 25 (b) "The Chanler Group in Trust for Brimer" in the amount of \$7,500.

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1           **3.5    Payment Address**

2           All payments required by this Consent Judgment shall be delivered to Brimer’s counsel at  
3 the following address:

4           The Chanler Group  
5           Attn: Proposition 65 Controller  
6           2560 Ninth Street  
7           Parker Plaza, Suite 214  
8           Berkeley, CA 94710

7           **4.    ENFORCEMENT OF CONSENT JUDGMENT**

8           Any Party may, by motion, application or any other remedy afforded by law, enforce the  
9 terms and conditions contained in this Consent Judgment. A Party may pursue such motion,  
10 application or other remedy afforded by law, however, only after that Party first provides notice  
11 to the Party allegedly failing to comply with the terms and conditions of this Consent Judgment,  
12 and attempts to resolve such Party’s failure to comply in an open and good faith manner for a  
13 period of no less than 30 days. The Parties agree and understand that the 30-day meet and confer  
14 resolution process provided by this Section shall not apply to a motion, application or any other  
15 remedy afforded by law that is pursued in order to enforce the payment terms of Sections 3.1 and  
16 3.3.

17          **5.    CLAIMS COVERED AND RELEASED**

18           **5.1    Brimer’s Public Release of Proposition 65 Claims**

19           This Consent Judgment is a full, final and binding resolution between Brimer acting on his  
20 own behalf and in the public interest and Capitol and its parents, subsidiaries, affiliated entities,  
21 sister and related companies, directors, officers, shareholders, employees, attorneys, successors  
22 and assigns (“Defendant Releasees”) and each entity to whom Defendant Releasees directly or  
23 indirectly distribute or sell Covered Products, including but not limited to distributors,  
24 wholesalers, customers, resellers, retailers, franchisees, and cooperative members, that sell or  
25 distribute the Covered Products to consumers or other third parties (“Downstream Defendant  
26 Releasees”) of all claims for violations of Proposition 65 up through the Effective Date based on  
27 exposures to lead from the Exterior Decorations on the Covered Products as set forth in the  
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1 Notice. Compliance with the terms of this Consent Judgment by Capitol and Defendant  
2 Releasees constitutes compliance with Proposition 65 with respect to exposures to lead from the  
3 Exterior Decorations on the Covered Products as set forth in the Notice.

4 **5.2 Brimer's Individual Release of Claims**

5 Brimer also, in his individual capacity only and *not* in his representative capacity, and on  
6 behalf of his attorneys, successors, heirs, assigns, and other representatives hereby waives,  
7 releases and forever discharge Defendants, Defendant Releasees, and Downstream Defendant  
8 Releasees from all actions, causes of action, obligations, costs, expenses, attorneys' fees,  
9 damages, losses, claims, liabilities and demands of plaintiff of any nature, character or kind,  
10 whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or  
11 actual exposures to lead in the Covered Products.

12 **5.3 Capitol's Release of Brimer**

13 Capitol on behalf of itself, its past and current agents, representatives, attorneys,  
14 successors, and/or assigns, hereby waives any and all claims against Brimer, his attorneys and  
15 other representatives, for any and all actions taken or statements made (or those that could have  
16 been taken or made) by Brimer and his attorneys and other representatives, whether in the course  
17 of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or  
18 with respect to the Covered Products.

19 **6. COURT APPROVAL**

20 **6.1** Brimer shall file a motion seeking judicial approval of this Consent Judgment  
21 pursuant to California Health & Safety Code § 25249.7(f), and Capitol shall support the entry of  
22 such motion.

23 **6.2** If this Consent Judgment is not approved by the Court: (a) this Consent Judgment  
24 and any and all prior agreements between the parties shall terminate and become null and void,  
25 and the action shall revert to the status that existed prior to the execution date of this Consent  
26 Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the negotiation,  
27 documentation, or other part or aspect of the Parties' settlement discussions shall have any effect,  
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1 nor shall any such matter be admissible in evidence for any purpose in this action, or in any other  
2 proceeding; and (c) the Parties agree to meet and confer to determine whether to modify the terms  
3 of the Consent Judgment and to resubmit it for approval.

4 **7. GOVERNING LAW AND CONSTRUCTION**

5 7.1 The terms of this Consent Judgment shall be governed by the laws of the state of  
6 California and apply within the state of California. In the event that Proposition 65 is repealed,  
7 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Covered  
8 Products, then Capitol may provide written notice to Brimer of any asserted change in the law,  
9 and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the  
10 extent that, the Covered Products are so affected. Nothing in this Consent Judgment shall be  
11 interpreted to relieve Capitol from any obligation to comply with any pertinent state or federal  
12 toxics control laws.

13 7.2 This Consent Judgment contains the sole and entire agreement and understanding  
14 of the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any  
15 and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are  
16 deemed merged. No representations, oral or otherwise, express or implied, other than those  
17 specifically referred to in this Consent Judgment have been made by any Party. No other  
18 agreements not specifically contained or referenced in this Consent Judgment, oral or otherwise,  
19 shall be deemed to exist or to bind any of the Parties. No supplementation, modification, waiver  
20 or termination of this Consent Judgment shall be binding unless executed in writing by the Party  
21 to be bound. No waiver of any of the provisions of this Consent Judgment shall be deemed or  
22 shall constitute a waiver of any of the other provisions whether or not similar, nor shall such  
23 waiver constitute a continuing waiver.

24 7.3 The Parties, including their counsel, have participated in the preparation of this  
25 Consent Judgment, and this Consent Judgment is the result of the joint efforts of the Parties. This  
26 Consent Judgment was subject to revision and modification of the Parties and has been accepted  
27 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or  
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1 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result  
2 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment  
3 agrees that any statute or rule of construction providing that ambiguities are to be resolved against  
4 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in  
5 this regard, the Parties hereby waive California Civil Code Section 1654.

6 **8. NOTICES**

7 Unless specified herein, all correspondence and notices required to be provided pursuant  
8 to this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class,  
9 registered or certified mail, return receipt requested; or (iii) overnight courier to the following  
10 addresses:

11 For Capitol:

12 Alasdair McMullan  
13 Executive Vice President, Legal and Business Affairs  
14 Capitol Records LLC  
15 150 Fifth Avenue  
16 New York, NY 10011

17 With a copy to:

18 Jeffrey B. Margulies  
19 Fulbright & Jaworski LLP  
20 555 South Flower Street, 41<sup>st</sup> Floor  
21 Los Angeles, CA 90071

22 For Brimer:

23 Proposition 65 Coordinator  
24 The Chanler Group  
25 2560 Ninth Street  
26 Parker Plaza, Suite 214  
27 Berkeley, CA 94710

28 Any Party, from time to time, may specify in writing to the other Party a change of  
address to which all notices and other communications shall be sent.

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**9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Consent Judgment may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

**10. MODIFICATION**

This Consent Judgment may be modified only by: (i) the written agreement of the Parties and upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or application of any Party and entry of a modified consent judgment by the Court.

**11. AUTHORIZATION**

The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions contained herein.


**AGREED TO:**

**AGREED TO:**

Date: 9-5-12

Date: 9/10/12

By:   
RUSSELL BRIMER

By:   
Colin Finkelstein, President  
CAPITOL RECORDS, LLC